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IN THE

Supreme Court of the United States

October Term, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (124-130)* has not been reported. The opinion of the Court of Appeals reversing the judgment of the District Court (164-180) is reported in 199 F. 2d 117.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1). The judgment of the Court of Appeals was entered on October 6, 1952 (180). A petition for re-

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

hearing filed on October 20, 1952 was denied on November 10, 1952 (181). Petition for a writ of certiorari was filed on December 18, 1952 and granted on February 9, 1953 (183). (97 L. ed. adv. p. 442).

Questions Presented

1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.
2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act.

Statute Involved

The pertinent provisions of Title II, Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.*, are printed in Appendix A *infra*, pp. 39-43.

Statement

Respondent Koppal brought action in the United States District Court for the Western District of Missouri, Western Division, based on diversity of citizenship, claiming that he had been wrongfully discharged contrary to the

terms of a collective bargaining agreement between petitioner and International Association of Machinists, a union representing the mechanics and related employees in the service of petitioner (1-18). Respondent was not a member of the union (2, 127). Petitioner as a carrier by air was subject to the Railway Labor Act and the contract was made pursuant to the Act so far as applicable (2, 19). It was stipulated by the parties that the contract was a Missouri contract (125).

Respondent in his complaint prayed for actual damages in the sum of $7,500 and for punitive damages in the sum of $15,000, averring that according to the union contract seniority, job and employment rights were vested in him of which he could not be deprived without just cause or reason. The union contract (Ex. A, 29-30, 31-88) did not prescribe what should constitute grounds for discharging an employee but respondent averred that he was wrongfully and unlawfully discharged for an alleged violation of the sick leave rule, that he was discharged without a fair hearing, was not notified in writing of the precise charge against him and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to the time of his discharge (1-18).

Upon the trial in the District Court, the following facts were established:

Respondent and one DeMattia, a fellow worker, were suspended from employment by petitioner on November 9, 1949, on the charge of abuse of sick leave pay privilege under the union contract (135; Ex. 1, 29-30, 88-89; Ex. A, Art. XVII (j), 80).

Immediately following their suspension, respondent and DeMattia were orally notified (135, 159) that a hearing would be granted them pursuant to the provision of the union contract governing discharge (Ex. A, Art. XI (b) (10), 67-68), which provides that:

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee."

The hearing was set for November 11, 1949, that date having been agreed upon with respondent (135). A letter was also written to respondent and the union grievance committee notifying them of the hearing (Ex. 1, 88-89). While the union stated that its copy was received on November 10 (152), respondent testified that he did not receive his copy until November 12 (97, 136), the day following the hearing. In any event respondent voluntarily attended the hearing on November 11, heard the written notice read and stated he was ready to proceed (97, 136, 151, 152, 154).

Evidence was presented at this hearing that respondent and DeMattia were both absent from work on November 8, 1949 (133, 140). Being shorthanded their foreman sent to see if they could report to work that afternoon (154), resulting in the discovery that respondent and DeMattia, who was discovered at respondent's home on the day of the alleged illness, had met by prearrangement to prepare for an examination for a higher position (133, 149-150, 152). There were various other circumstances indicating

that both men were guilty of abusing their sick leave privileges (135, 143, 153, 154-155, 158).

As summarized by the Court of Appeals in its opinion (166), "the evidence produced at this hearing was such that . . . anyone called upon to hear and weigh the testimony and circumstances could properly conclude and find therefrom that plaintiff had not been honest in this claim of illness and had been guilty of abusing his sick-leave privileges."

At the conclusion of the hearing the hearing officer stated that it was his decision that there had been a severe case of abuse of sick leave privilege and that the two men would be discharged. However, in order not to prejudice their securing other employment, he offered them an opportunity to resign if they so desired (159). Both respondent and DeMattia handed in written resignations (Ex. 2, 29-30, 89), respondent indicating that he was doing so reluctantly and "under protest" (98, 138).

The contract provided that if the initial decision of the hearing officer was unsatisfactory an appeal could be taken to the chief operating officer of petitioner (Ex. A, Art. XI (b) (5) (10), 66-68).

Both men were specifically advised that notwithstanding their resignations they could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

At the trial petitioner argued that because of respondent's failure to appeal to petitioner's chief operating officer

respondent could not present a justiciable controversy in a Missouri forum. The District Court allowed the case to go to the jury and a verdict in favor of respondent in the amount of $7,500 was returned on March 10, 1951 (118). Thereafter, however, on motion of petitioner, the District Court on June 7, 1951 set aside the verdict and entered judgment dismissing the complaint (120-121).

The District Court held that the contract, being a Missouri contract (125), was to be interpreted according to the law of the State of Missouri and that the cases of *Reed* v. *St. Louis S.W. R. Co.*, 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 68 F. 2d 826, required that plaintiff, under the facts of this case, exhaust the remedies provided in his contract of employment to have his cause of discharge reviewed on appeal, as provided in the contract, before bringing an action on the contract for wrongful discharge (126).

In addition, because he believed he had erred under Missouri law in allowing the jury to consider mental anguish as an element of damages, the District Judge alternatively ruled that if, on appeal, it should be held that he erred in dismissing the complaint, there should nonetheless be a new trial unless plaintiff filed a remittitur of $6,200 (120-121, 129).

On July 7, 1951, respondent filed his notice of appeal in the District Court (130). The case was orally argued in the Court of Appeals on March 7, 1952 (163).

The Court of Appeals on October 6, 1952 (180) reversed the order of the District Court and remanded the cause for further proceedings with an opinion by Judge Johnsen, a concurring opinion by Judge Collet and a dissenting opinion

by Judge Riddick (164-180). Judges Johnsen and Collet held that the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled the *Reed* and *Harrison* cases, *supra*, and held that the collective bargaining agreement was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law. The opinion stated (173):

> "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."

It concluded that Missouri would not be at liberty to hold that adjustment provisions of a contract made under and pursuant to the Railway Labor Act constituted conditions precedent to the right to sue for wrongful discharge.

In his dissenting opinion, Judge Riddick pointed out that state substantive law was alone controlling here, stating (178):

> "The District Court was correct in holding that the controlling substantive law was that of Missouri concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.
>
> "There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

Although a majority of the Court of Appeals found that "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, and the contract had left that ground, under proper motive, as a sufficient legal basis for the action which the employer [petitioner] took" (167), the Court went on to hold that respondent was entitled to have a jury pass on the question of whether or not he waived the notice requirements of the union contract (167-170) even though respondent admitted that he had no doubt whatever about the charge against him (144), voluntarily attended the hearing on the date agreed upon, heard the written notice read at the commencement of the hearing and stated he was ready to proceed (136, 152, 154). The Court of Appeals accordingly remanded the case for further proceedings.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the Railway Labor Act precluded the District Court from applying state law, otherwise controlling, governing the right to bring the action;

(2) In holding that the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, and;

(3) In reversing the order of the District Court dismissing the complaint.

Summary of Argument

Under the substantive law of Missouri an employee, before bringing an action for wrongful discharge under a contract of employment, must attempt to adjust his dispute with his employer in accordance with any remedial provisions of the contract of employment. Since respondent failed to appeal to the chief operating officer of petitioner in accordance with the grievance procedure of the collective bargaining agreement upon which he sought to predicate his action, he cannot present a justiciable controversy under the law of Missouri. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

This Court in its decisions in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, has made it plain that state substantive law controls in this action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely on diversity of citizenship and the sum in controversy.

The Railway Labor Act does not preclude the application of the Missouri rule to the case at bar. Moreover, the Missouri rule would be entirely consistent with the Railway Labor Act, which provides "The disputes between an employee . . . and a carrier or carriers by air . . . *shall* be handled in the usual manner *up to and including* the chief operating officer of the carrier . . ."*

The Missouri rule promotes industrial peace and reduces litigation by providing a speedy and inexpensive

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* 49 Stat. 1189, Sec. 204, 45 U. S. C. § 184.

channel to dispose of grievances by peaceful adjustment in entire conformity with the Railway Labor Act. The District Court correctly ruled that Missouri substantive law was controlling in this action and it was error for the Court of Appeals to reverse the ruling of the District Court dismissing respondent's complaint.

POINT I

Under the substantive law of Missouri respondent can show no breach of contract, having failed to exhaust the contract remedy of appeal to petitioner's chief operating officer.

In Missouri, employment without definite term is terminable by either party at will. *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 622, 212 S. W. 2d 82; *Bell* v. *Faulkner*, Mo. App., 75 S. W. 2d 612. Accordingly, respondent was compelled to turn to the collective bargaining agreement (Ex. A, 29-30, 31-88), in order to show any tenure of employment whatsoever. In this respect Article XI (b) (10) of the agreement provides (67-68):

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee. Suspension from the service of the Company pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of

the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. If a stenographic report of the investigation is taken, the Union Committee or representative will be furnished a copy. A written decision will be issued within five (5) work days after the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3."

The "procedure prescribed in Step 3" referred to in Section 10 is that found in Article XI (b) (5) (66):

> "If the decision in Step 2 or 2B is not satisfactory, then appeal may be made by the System General Chairman to the Chief Operating Officer of the Company or his authorized representative. Notice of intent to appeal will be in writing and must be made within ten (10) work days after the decision in Step 2 or 2B, and the actual appeal must be perfected and submitted within thirty (30) days from date of original notice. The decision in Step 3 must be given within ten (10) work days after presentation of the grievance in the third step."

Under Missouri law, where a contract is entered into between an employer and the union representing the employees for the purpose of establishing a complete and explicit code for the adjustment of labor disputes, to prevail in a suit based upon an alleged breach of such a contract the employee must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. Where he fails to do this he is unable to present his case in court as a justiciable controversy. *Reed* v. *St. Louis S. W. R.*

Co., Mo. App., 95 S. W. 2d 887, 889; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827. This rule is succinctly stated at page 889 of the opinion in the *Reed* case as follows:

> "But concededly no appeal was taken by respondent, and thus having failed to exhaust the remedies provided for in the contract in the manner relating to his discharge, plaintiff cannot present his case in court as a justiciable controversy."

In the case at bar at the conclusion of the initial hearing, respondent handed in his written resignation (Ex. 2, 29-30, 89). He was advised that notwithstanding his resignation he could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

Because he failed to attempt to secure the peaceful adjustment of his dispute within the framework of his collective bargaining agreement, the District Judge held that respondent could not present his case as a justiciable controversy, saying that the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, 889, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827, "require plaintiff, under the facts of this case, to exhaust the remedies provided in his contract of employment, to have his cause of discharge reviewed on appeal as therein provided, before bringing an action on the contract for wrongful discharge" (126). As further pointed out by the District Judge (128), ". . . the breach of contract does not occur at the conclusion of the first hearing, but could only occur after

he has exhausted all of his remedies to have the cause of his discharge reviewed as provided in the contract."

The District Judge recognized (124-126) that the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, did not overrule Missouri substantive law as set forth in the *Reed* and *Harrison* cases, *supra*.

The Court of Appeals, Judge Riddick dissenting, noted that under Missouri law the substantive right of recovering damages for wrongful discharge is not enforceable so long as there exist administrative remedies under the contract which have not been exhausted, but reversed on the ground that:

> "The collective bargaining agreement, however, was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law" (171-172).

It based this conclusion on the fact that:

> "The contract was one made under and pursuant to the prescriptions of the Railway Labor Act, Title II, 45 U. S. C. A. §§181 et seq. Recitation of that fact is made in its preamble and its body contains a specific provision that 'Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the Company or to their duly accredited representatives, under the provisions of the Railway Labor Act'" (172).

It also noted that the administrative-remedy provisions of the agreement conform to the requirements of the Act. Upon this basis the Court decided that:

> "The nature and effect of the provisions for the administrative adjustment of disputes contained in the contract are therefore questions relating to the Railway Labor Act and not to Missouri Law" (172).

The majority was under the impression that the nature and effect of such provisions in a contract made under the Railway Labor Act had been settled by this Court in *Moore* v. *Illinois Central R. Co.*, irrespective of state law (172). The Court below misconstrued the decision of this Court in the *Moore* case as obviating the need for resort to these adjustment provisions as a prerequisite to suit in any state court. As a result the Court concluded:

> ". . . Missouri would not, of course, be at liberty to hold contrarily that the adjustment provisions of a contract made under and pursuant to the Railway Labor Act were compulsory in nature and constituted conditions precedent to the right to sue for wrongful discharge in an employment relationship covered by the Act: Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act. So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173).

The inconsistency in this is that although, according to the Court below, the contract would have to be treated by the Missouri Courts "for justiciable purposes in their

forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173), in Missouri without these administrative adjustment provisions in the contract, the employment would be terminable at will, and no action for wrongful discharge could lie. *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 622, 212 S. W. 2d 82; *Bell* v. *Faulkner*, Mo. App., 75 S. W. 2d 612. It is upon the language of these provisions that an employee will not be discharged "without a fair hearing" that respondent predicated his action. If the Court of Appeals deletes the administrative adjustment provisions, for justiciable purposes in a Missouri forum, it also destroys respondent's case.

As shown in Point II *infra*, however, this Court in the *Moore* case did not overrule the *Reed* and *Harrison* cases nor make them inapplicable in disposing of this controversy.

POINT II

The result reached by the Court of Appeals is contrary to the decision of this Court in the *Moore* case.

The action which came before this Court in 1941 in the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, was originally commenced in the Mississippi state courts. In his declaration in the state court Moore alleged that he was arbitrarily discharged by the defendant railroad on February 15, 1933, and he sought damages in the sum of $3,000.

A demurrer to the complaint on the ground that his *contract* required him to adjust his dispute was overruled

on November 8, 1937 by the Mississippi Supreme Court, 180 Miss. 276, 176 So. 593. The Mississippi Supreme Court in refusing to enforce the contract relied on rulings in fraternal benefit society cases,* overlooking the more apposite rulings of the Alabama Supreme Court on January 18, 1934 in *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434, and *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441. The Mississippi Supreme Court also ruled that Moore's suit was not on an oral contract (barred by the Mississippi three-year statute of limitations), but on a written contract made with the railroad for his benefit by the Brotherhood of Railroad Trainmen; hence, timely as commenced within the period of the Mississippi six-year statute of limitations applicable to written contracts.

After the decision by the Mississippi Supreme Court, Moore amended his declaration for damages in excess of $3,000 and the railroad removed the case to the Federal Court. The railroad renewed the pleas made in the state court, contending that the Federal Court had power to determine for itself the sufficiency of these pleas, while Moore contended that the decision of the state court was *res judicata*. Believing that it was bound to apply state substantive law in view of the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the District Court said, 24 F. Supp. 731, 733:

> ". . . It is not necessary to determine whether the effect of the ruling is res adjudicata or the law of the case in view of the holding of the Supreme Court

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* *Independent Order of Sons & Daughters of Jacob* v. *Wilkes*, 98 Miss. 179, 53 So. 493; *Eminent Household of Columbia Woodmen* v. *Ramsey*, 118 Miss. 454, 79 So. 351; *Eminent Household of Columbian Woodmen* v. *Payne*, 18 Ala. App. 23, 88 So. 454.

> of the United States in the recent case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. The decision of the Supreme Court of Mississippi was an announcement of the court of last resort in this state of the law pertaining to the contract sued upon, and under the Erie Railroad Company Case is conclusive."

Moore recovered a judgment. On appeal, the Circuit Court of Appeals for the Fifth Circuit, Judge Holmes dissenting, held that the doctrine of *Erie* v. *Tompkins* applied only to local matters governed wholly by state law. It took the view that, 112 F. 2d 959, 963: "A railroad union contract applying over a railroad system which operates in many States is not such. Its meaning and effect ought to be the same in each State." It held, p. 964:

> "A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority. The decisions of the Supreme Court of Mississippi are entitled to the same respectful consideration as are those of the courts of other States, but no more."

It concluded that the requirement under the adjustment provisions of the collective agreement, that an appeal be taken to the highest operating officer, was not a prerequisite to a suit in court, determining this question as a matter of

Federal law. It reversed, however, on the ground that the action was barred by the three-year statute of limitations because it was not apparent that Moore's contract of employment was wholly provable in writing.

In dissenting in this case, Judge Holmes said, 112 F. 2d 959, 967:

> "Upon the facts before us, the federal court is not authorized to exercise an independent judgment, either as to the construction of the contract sued on or as to the applicable statute of limitations. Both are questions of state law, and we should follow the state court. The highest court of Mississippi has held that the action is not barred, and I think we are bound by its decision, since it does not appear that the state court has altered its opinion."

Following grant of certiorari, 311 U. S. 643, this Court reversed the judgment of the Circuit Court of Appeals for failure to follow *Erie R. Co.* v. *Tompkins* and affirmed the judgment of the District Court, saying, 312 U. S. 630, 634:

> "But even before the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts."

In the *Moore* case the respondent railroad contended that Moore was required by the Railway Labor Act itself to exhaust his remedy under the collective bargaining agreement for adjustment of his grievance as a prerequisite to resort to the courts. In its opinion this Court said, 312 U. S. 630, 634:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

It seems clear that the sole basis for decision on this point in the *Moore* case was that the Act itself did not impose such a requirement. Mississippi law governing the case imposed no such requirement, *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593, and Mississippi law on this point was controlling under *Erie R. Co.* v. *Tompkins*. That this is the effect of the *Moore* case is made clear in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. In holding in that case that courts had no jurisdiction to invade the exclusive province of the National Railroad Adjustment Board to adjudicate a jurisdictional dispute involving a railroad and two employee accredited bargaining agents, this Court explained its decision in the *Moore* case as follows, 339 U. S. 239, 244:

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a col-

lective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Thus the effect of the *Moore* and *Slocum* cases is to establish merely that the Railway Labor Act does not oust state and federal courts of jurisdiction to adjudicate a common-law or statutory action for wrongful discharge. What law is to apply in such an action? If the Act, itself, is not controlling as this Court made plain in the *Moore* case, then state law must apply.

Merely because the local law of Mississippi happens to be different from the local law of Alabama and Missouri as to the necessity for exhausting such remedies does not affect the principle involved. The principle is that when an employee sees fit to sue for wrongful discharge under such a contract he divorces himself from any application of the Railway Labor Act and submits himself to an adjudication of his rights and remedies under the law of the forum. The obvious effect of the *Moore* and *Slocum* decisions is to leave the state courts free to apply whatever local law is controlling in the adjudication of an action in the state court or under state law involving a wrongful discharge whether it be to require or not to require exhaustion of adjustment procedure under the contract.

In holding, as the Court of Appeals did in this case (173), that:

> "Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act"

the court below has reached a result opposite to that of the *Moore* case. It makes the Railway Labor Act controlling on a subject which this Court left to decision under local law as required by *Erie R. Co.* v. *Tompkins*.

The result is obscure. Although Missouri law is said not to be applicable to relationships under the Railway Labor Act, the Act itself is not made applicable to this dispute. The Act in Section 204 prescribes that disputes between an employee and a carrier by air, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. If, therefore, this dispute were regulated by the Act, respondent would have been required to adjust the dispute under the procedure in the contract by handling it in the usual manner up to and including the chief operating officer of the carrier, reaching the same result as under Missouri law. In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, this Court said at pages 724-725: "To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes," emphasizing this view in footnotes 12, 18, 26 and 27. In particular footnote 18 states " . . . The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor." Similarly footnote 26 emphasizes the Congressional direction that disputes "*shall be handled in the usual manner up to and including* the chief operating officer of the carrier . . ." [Emphasis by the Court]

It is submitted that Judge Riddick in his dissenting opinion below correctly summarizes the effect of the *Moore* case (179-180):

> "Where either action [i.e., a proceeding before the Adjustment Board or an action at law for breach of contract] is available, the litigant has his choice. That is all the *Moore* case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling."

The view of Judge Riddick as to the holding of this Court in the *Moore* case is shared by the Supreme Court of Missouri, for in the case of *Craig* v. *Thompson*, Mo. Sup., 244 S. W. 2d 37, 44, Judge Conkling, speaking for that Court, said that the *Moore* case:

> ". . . merely reversed the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in a case, 112 F. 2d 959, wherein the latter court had refused to follow the ruling of the Mississippi Supreme Court in the latter court's ruling, 180 Miss. 276, 176 So. 593, construing a Mississippi Statute of Limitations."

POINT III

The Railway Labor Act does not preclude but rather invites the application of Missouri law which requires an appeal to the chief operating officer of a carrier as a condition precedent to a suit against the carrier for wrongful discharge.

By the Act of April 10, 1936, 49 Stat. 1189, Title II was added to the Railway Labor Act, 45 U. S. C. §§ 181 *et seq.*, thus bringing within the purview of that Act, except as to Section 3 of Title I, "every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Title II specifically provides in Section 204:*

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

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*45 U. S. C. § 184.

The extract from Section 204, quoted above, contains the only pertinent provisions governing the adjustment of disputes between air carriers and their employees. If the language employed by Congress is at all pertinent it would appear to invite, not merely permit the Missouri rule, and could not be said to preclude it.

In Section 3(c) of the original 1926 Act, 44 Stat. 578 (Appendix B *infra*, p. 44), Congress employed the mandatory "shall," both in prescribing (1) the duty of employers and employees subject to the Act to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions up to and including the chief operating officer of the carrier designated to handle such disputes and (2) the further duty, in event of failure to reach adjustment in such manner, to refer the dispute to the designated adjustment board.

In the 1934 amendment, 48 Stat. 1185 (Appendix B *infra*, p. 45), the mandatory "shall" was retained with respect to the duty to handle disputes up to and including the chief operating officer of the carrier, while the permissive "may" was employed with respect to the further reference of disputes remaining unadjusted in such manner to the appropriate division of the National Railroad Adjustment Board.

In adding Title II to the Railway Labor Act by the 1936 amendment, 49 Stat. 1189 (Appendix A *infra*, pp. 39-43), again the mandatory "shall" was employed with respect to the duty to handle disputes up to and including the chief operating officer of the carrier and the permissive "may" was employed with respect to the further reference of un-

adjusted disputes to the appropriate adjustment board established under Section 204 of Title II.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635, this Court deemed it significant that Section 153 First (i), "as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .,'" pointing out that it was "significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .'."

The legislative history of the 1934 amendment gives no express answer as to why Congress changed the second "shall" in Section 153 First (i) to "may," while retaining the first "shall" in that section. It is not unreasonable to assume, however, that Congress recognized that in providing for the establishment of the National Railroad Adjustment Board in the place of the former system boards of adjustment, an election of remedies would exist when the case was referred under proper authorization to the National Railroad Board of Adjustment. This was precisely the effect of the 1934 amendment because Congress then, for the first time, made provision in Section 153 First (l) for the breaking of a deadlock by the mandatory appointment of a neutral "referee."

If the change of the second "shall" to "may" was a studied change, the retention of the first "shall" in both the 1934 amendment to Section 153 First (i) and the 1936 amendment adding Section 204 under Title II was equally studied, for the entire legislative history of the Railway

Labor Act makes it clear that Congress meant to encourage and require the peaceful adjustment of "all disputes covered by the Act, whether major or minor."*

Neither the plain words repeatedly employed by Congress in the original 1926 Act and the 1934 and 1936 amendments prescribing that disputes *shall* be handled *up to and including* the chief operating officer of the carrier, nor the legislative history of the original Act and its successive amendments (see Appendix C *infra*, pp. 46-50), can be reconciled with the view that the Act itself would preclude the application of the Missouri rule to the case at bar.

This Court has repeatedly examined the legislative history of the Railway Labor Act and the Congressional purpose to prevent interruption of service in interstate commerce by making full and complete negotiations to settle promptly all disputes obligatory on employer and employees alike. Never has this Court intimated that Congress intended to invalidate state substantive law requiring such attempted adjustment contemplated by contract as a condition precedent to a suit for unlawful discharge in a state forum. In *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 567-568, this Court said:

> "It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures

* *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 725 n. 18.

[i.e., interference with the freedom of employees to designate representatives]."

Mr. Chief Justice Hughes in delivering the unanimous opinion of the Court in this case went on to say, at page 571:

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."

The foregoing views of Mr. Chief Justice Hughes were reaffirmed by this Court in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 559, where Mr. Justice Stone, again speaking for a unanimous Court, said:

> ". . . it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process.
>
> ". . . The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.'"

Had petitioner made no contract with respondent here, under Missouri law respondent's employment would have been terminable at will by either party. *Culver* v. *Kurn,* 354 Mo. 1158, 193 S. W. 2d 602. Since Congress, as evidenced by the foregoing opinions of this Court, had no

intention to interfere with the normal exercise of the right of the carrier to select its employees or to discharge them, Congress clearly did not disturb long standing local law, under which employment under a collective bargaining agreement is still terminable at will.* How then can Congress be said to have invalidated the Missouri rule which requires the employee to appeal to the chief operating officer and fail to secure a satisfactory adjustment of his grievance before resort to the courts.

When Congress provided in Section 204 of Title II that disputes *shall* be handled in the usual manner *up to and including* the chief operating officer of the air carrier, clearly Congress invited the Missouri rule which enforces the contract the parties have made. That Congress never contemplated interfering with a state court's construction of such a contract even in the railroad field is expressly evidenced by the provision in Section 3 Second of the 1934 amendment, 48 Stat. 1193, 45 U. S. C. §153 Second, which provides "Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section . . ."

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*Petty v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.).

This is the first time this Court has had occasion to consider in detail Section 204 of Title II of the Railway Labor Act. It thus becomes pertinent to examine one significant difference between the National Railroad Adjustment Board established under Section 3 of the 1934 amendment* and the TWA System Board of Adjustment established under Article XII of the collective bargaining agreement (Ex. A, 68-73) in conformity with the provisions of Section 204 of Title II of the Railway Labor Act, 49 Stat. 1189, 45 U. S. C. § 184, Appendix A *infra*, pp. 39-43.

When a case is referred to the National Railroad Adjustment Board if a deadlock should arise between the employer-employee representatives, it is *required* that it be broken by the appointment of a neutral "referee" pursuant to Section 3 First (l) of the 1934 amendment, 48 Stat. 1191, 45 U. S. C. § 153 First (l). Furthermore, when a case is referred to the National Railroad Adjustment Board by proper authorization of the parties, an election of remedies clearly has been made and the decision of the National Railroad Adjustment Board becomes final and binding on the parties, as provided in Section 3 First (m); 48 Stat. 1191-2, 45 U. S. C. § 153 First (m). *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711.

Unlike the situation obtaining in the case of railroads, there is no counterpart of the National Railroad Adjustment Board for air carriers under Title II of the Railway Labor Act. Instead, under Section 204, while vesting a yet unexercised power in the National Mediation Board to establish in its discretion a National Air Transport Adjust-

*48 Stat. 1189, 1191, 45 U. S. C. § 153 First, Appendix B *infra*, p. 45.

ment Board, comparable to the National Railroad Adjustment Board, Congress has merely made provision for establishment of boards of adjustment by each air carrier and its employees, such as the one established by petitioner here under Article XII of the collective bargaining agreement (Ex. A, 68-73).

The TWA System Board of Adjustment so established consists of four members, two selected by the Company and two selected by the Union (69). In the event the parties are unable to secure peaceful adjustment of a grievance and a deadlock ensues, they agree to attempt to break the deadlock by endeavoring to select a neutral referee (71-72). There is no obligation to agree on such a referee however and, if the parties are unable to agree on a referee and fail to break the deadlock by peaceful adjustment of the dispute voluntary in nature, there has been no election of remedies as would have existed had the case been referred to the National Railroad Adjustment Board, with the result that in the event the parties are unable to agree upon a peaceful adjustment of the dispute before the TWA System Board of Adjustment, either party would thereafter be free to resort to the courts.

Clearly there is no election of remedies when the parties are seeking peaceful adjustment of the dispute by handling the case in the usual manner up to and including petitioner's chief operating officer. An election of remedies can only exist when the dispute is referred to a board of adjustment finally empowered to decide the controversy. This likewise is the ruling of the Missouri Supreme Court in its decision in the case of *Wilson v. St. Louis-San Francisco Ry. Co.*, 362 Mo. 1168, 247 S. W. 2d 644, where, after the case was handled up to the chief operating officer of

the carrier, an election of remedies was held not to have been made where the employee had not authorized the union to submit his case to the National Railroad Adjustment Board.

Thus not only the handling of cases up to petitioner's chief operating officer but also the subsequent reference of such cases by proper authorization of the parties to the TWA System Board of Adjustment is in entire conformity with the "consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."*

The Missouri rule requiring an appeal to the chief operating officer of the carrier is followed in Alabama and Oklahoma and a similar principle has been followed by federal district courts in California and Nebraska. *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 210; *Wallace* v. *Southern Pac. Co.*, 106 F. Supp. 742, 745 (N. D. Calif.); *Davis* v. *Union Pacific R. Co.*, 21 CCH Labor Cases ¶66,834 (D. Neb.). Texas originally followed the Missouri rule, but misreading the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, reversed its prior holdings and in the case of *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716, adopted the Mississippi rule established in *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593. Since its decision in the case at bar below, the United States Court of Appeals for the Eighth Circuit has followed its ruling below in the case of *Oswald* v. *Chicago, B. & Q. R. Co.* (C. A. 8th Dec. 31, 1952), 200 F. 2d 549.

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* *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635-636.

Arkansas, Kansas and Kentucky apply still a different rule, holding that contracts such as the one at bar are unilateral, lacking in mutuality and unenforceable. *Petty* v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.); *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576; *Gambrel* v. *United Mine Workers of America*, 249 S. W. 2d 158 (Ky.); *Louisville & N. R. Co.* v. *Wells*, 289 Ky. 700, 160 S. W. 2d 16; *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749. Hence in these states likewise, though for a different reason, respondent could not maintain this action.

The present state of law in the various states may therefore be summarized as follows:

1. Arkansas, Kansas and Kentucky* refuse to regard a provision in a collective bargaining agreement that an employee shall not be discharged, except in accordance with the grievance adjustment provisions of the agreement, as affording any tenure of employment sufficient to ground an action for wrongful discharge, because there is no mutuality in the absence of any obligation on the part of the employee to serve for any term.

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* *Petty* v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.); *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576; *Mitchell* v. *Stanolind Pipe Line Co.*, 184 F. 2d 837 (C. A. 10th); *Gambrel* v. *United Mine Workers of America*, 249 S. W. 2d 158 (Ky.); *Louisville & N. R. Co.* v. *Wells*, 289 Ky. 700, 160 S. W. 2d 16; *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749.

2. Mississippi, and belatedly, Texas,* find in the adjustment provisions of the contract governing discharge a basis for an action for wrongful discharge but refuse to require the discharged employee to pursue his remedy under the adjustment provisions creating the cause of action as a condition precedent to suit in the courts.

3. Alabama, Missouri and Oklahoma** afford a cause of action to an individual employee under the adjustment provisions of the collective bargaining agreement for wrongful discharge, but hold that there has been no breach of contract and hence no justiciable controversy exists, until the employee has attempted to secure a peaceful adjustment of his dispute by appeal to the chief operating officer of the carrier and has not then received a fair hearing.

The Missouri rule last described finds support not only in the Congressional intent manifested in the Railway Labor Act, but also under ordinary common law concepts which (1) favor compromise to litigation*** and (2) require the plaintiff claiming damages for alleged breach of contract to minimize his loss.****

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* *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593; *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716.

** *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826; *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 210.

*** ". . . compromises of disputed claims ought to be and in fact are favored and supported by the courts. Reduction of litigation by mutual agreement of litigants is much to the public interest; . . ." 1 Corbin, Contracts §187 (1951).

**** Cf. *Squire* v. *Wright*, 1 Mo. App. 172; *Price* v. *Davis*, 187 Mo. App. 1, 173 S. W. 61; *Flickema* v. *Henry Kraker Co.*, 252

One of the most important purposes of the grievance procedure, sought by the Union and Company alike, is to permit a full hearing of all disputes so that all the facts may be fairly presented and, if at all possible, an amicable adjustment reached. If this purpose is to be achieved it can only be had by the best efforts of both sides to the controversy. Since the encouragement of such efforts* appears to have been one of the primary aims of Congress in providing that disputes *shall* be handled *up to and including* the chief operating officer of the carrier, the Missouri rule is to be favored over the Mississippi rule which would jettison the entire grievance procedure established by the International Association of Machinists and petitioner in conformity with the requirements of the Railway Labor Act.

Congress has recognized that it is in the public interest that sound and harmonious industrial relations prevail in the railroad and airline industries. To achieve such industrial peace was one of the primary aims of the Railway Labor Act. That no small measure of success has

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Mich. 108, 233 N. W. 362; *Schisler* v. *Perfection Milker Co.*, 193 Minn. 160, 258 N. W. 17. This rule would be peculiarly apt in this case where "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, . . ." (167).

Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 et al. v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50, 58: "The policy of the Railway Labor Act was to encourage use of the non-judicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes." Cf. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338." See also H. R. Rep. No. 328, 69th Cong., 1st Sess. 3, numbered ¶5 (1926).

is evidenced by the fact that the National Mediation Board has not as yet found it necessary to establish a National Air Transport Adjustment Board and the fact that the instant occasion marks the first time since the passage of the 1936 amendment to the Act that petitioner's administration of the grievance procedure has been challenged in any court.

Certainly in this case there was no attempt whatever on the part of respondent to achieve a peaceful adjustment of his controversy. Not only did respondent make no effort to present the full facts at his initial hearing where he called no witnesses (154-155) and concealed the identity of one witness who was familiar with the facts on which the charge was based (143, 166, 176); he thereafter thwarted the entire purpose of the grievance procedure by failing to appeal his case to petitioner's chief operating officer (99), thus ending the case on the basis of his written resignation (Ex. 2, 30, 89; Ex. A, Article XI (b) (8), 67).

As the District Judge aptly held (128), there could be no breach of contract until respondent failed to receive fair treatment from petitioner's chief operating officer. Having failed to appeal (99), respondent is in no position to contend that the treatment he received was unfair.

Petitioner, as well as respondent, had a substantial interest to be served in having this controvery reviewed by petitioner's chief operating officer. Labor unrest resulting from the unsatisfactory handling of grievances can be disastrous and petitioner has an obvious self-interest in promoting sound industrial relations. In an air transport system that today operates domestically from Cali-

fornia to New York and thence overseas to Ceylon, harmonious industrial relations are promoted when petitioner's chief operating officer has the opportunity to review cases which cannot be peacefully adjusted in the initial stages of the grievance procedure.

Beyond this petitioner has a substantial investment in the cost of training skilled pilots to fly and expert mechanics to maintain the aircraft it operates. It cannot be presumed that petitioner's chief operating officer would lightly dissipate such investment by arbitrary action on review of any grievance. *Olsen* v. *Arabian American Oil Co.*, 97 F. Supp. 801, 803 (E. D. N. Y.), aff'd, 194 F. 2d 477, cert. denied, 344 U. S. 817.

By providing in Section 204 of Title II of the Act that "disputes between an employee . . and a carrier or carriers by air . . . *shall* be handled in the usual manner *up to and including* the chief operating officer of the carrier . . .," Congress clearly invited the Missouri rule and the order of the District Judge (120-121) dismissing respondent's complaint was correct.

CONCLUSION

The order of the Court of Appeals should be reversed and the order of the District Court dismissing respondent's complaint should be affirmed.

Respectfully submitted,

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Dated: March 13, 1953.

APPENDIX A

Railway Labor Act, Title II, P. L. 487, 74th Cong. 2d Sess., April 10, 1936, 49 Stat. 1189:

"TITLE II

"SECTION 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"SEC. 202. The duties, requirements, penalties benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were secifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof.

"SEC. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b). Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

"The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

"SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional

boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

"SEC. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the 'National Air Transport Adjustment Board.' Two mem-

bers of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 3 of title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of title I of this Act. The powers and duties prescribed and established by the provisions of section 3 of title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board

by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

"SEC. 206. All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. The books, records, and papers of the National Labor Relations Board and of the National Labor Board pertinent to such case or cases, whether settled or unsettled, shall be transferred to the custody of the National Mediation Board.

"SEC. 207. If any provision of this title or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"SEC. 208. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act."

Approved, April 10, 1936.

APPENDIX B

The pertinent provisions of §204 of Title II of the Railway Labor Act, 45 U.S.C. §184, are derived from the language of §3 First (i) of the Railway Labor Act of 1926, 45 U.S.C. §153 First (i), as amended.

The section as first passed read, 44 Stat. 578, 69th Cong., 1st Sess., c. 347, May 20, 1926:

> "SEC. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.
>
> The agreement—
>
> (a) Shall be in writing;
>
> (b) Shall state the group or groups of employees covered by such adjustment board;
>
> (c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute . . ."

This section was amended in 1934, to read as follows, 48 Stat. 1189, 1191, 73d Cong., 2 Sess., c. 691, June 21, 1934:

Appendix B

"'SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

• • • •

"'(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

APPENDIX C

The legislative history of the Railway Labor Act, 44 Stat. 577, 45 U.S.C. §§151 *et seq.*, was referred to in *Texas & N.O.R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515.

The House Committee on Interstate and Foreign Commerce, in summarizing the bill which became the Railway Labor Act, said, H. R. Rep. No. 328, 69 Cong., 1st Sess. 3 (1926):

> "(4) Disputes between employers and employees are divided into three classes:
>
> "(a) Disputes over grievances or the interpretation or application of agreements.
>
> "(b) Disputes over proposed changes in agreements concerning rates of pay, rules or working conditions.
>
> "(c) All other disputes.
>
> "(5) All disputes must be considered first in conference, but if not settled in conference disputes in class *b* and *c* are considered directly by the Government board of mediation. Disputes in class *a* if not settled in conference must be referred to an adjustment board and are only considered by the board of mediation if not decided by the adjustment board:"

In 1934 at least five bills to amend the Railway Labor Act were introduced into the Seventy-Third Congress. Congress gave most of its attention to two of these, H.R. 9861 and S. 3266, which both contained the language of §3 which appeared in the amendment as enacted. The hearings, committee reports and debates in the Seventy-Third

Congress do not say anything significant about the substitution of "may" for "shall" in connection with the reference of disputes to the National Railroad Adjustment Board.

In 1936 Title II of the Railway Labor Act was enacted. 49 Stat. 1189, 45 U.S.C. §§181 *et seq.* As a bill it was S. 2496, 74th Cong., 1st Sess.

As originally introduced §204 of the bill was as follows:

> "SEC. 204. Nothing in this title shall be construed to prevent any individual carrier, system, or group of carriers by air, and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of system, group, or regional boards of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment under the authority of section 3 of title I of this act; or, pending the establishment of a permanent national board of adjustment as hereinafter provided, to prevent said carriers by air and any class or classes of their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of a national board of adjustment of temporary duration and of similarly limited jurisdiction."

At the hearings on S. 2496 before the Senate Committee on Interstate Commerce, the National Mediation Board, through its Secretary, George A. Cook, suggested that this section be replaced with the language in the same section of a similar bill, H.R. 7268, 74th Cong., 1st Sess.

The language in H.R. 7268 repeated that of §3 First (i) of Title I of the Railway Labor Act, 45 U.S.C. §153 First (i), as amended in 1934. The Board submitted a statement, *Hearings before the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess.* 11 (1935):

> "Furthermore the bill in its present form would therefore depart from the plan devised in the Railway Labor Act for handling disputes among the employees of the railroads, wherein the line is drawn so that the Mediation Board will deal only with the representation cases and cases involving the larger questions of changes in rules and working conditions, leaving to the National Railroad Adjustment Boards the settlement of individual grievances arising from disputes involving the interpretation of contracts."

There occurred this colloquy with Mr. Cook, *Hearings* at 11-12:

> "Senator BLACK. Mr. Chairman, may I ask Mr. Cook a question.
>
> "Senator MINTON (chairman of the subcommittee). Certainly, Senator Black.
>
> "Senator BLACK. As to substituting for sections 203 and 204 what you suggest, might I ask if those substitutes are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment.
>
> "Mr. COOK. I understand so.
>
> "Senator BLACK. The object is not to impair the effectiveness of the bill but simply to make it apply

with uniformity to both classes of employees, as I understand it.

"Mr. COOK. That is correct."

The Senate Committee on Interstate Commerce reported S. 2496 with the suggested amendment. Sen. Rep. No. 895, 74th Cong., 1st Sess. 3 (1935).

The Senate accepted the amendment with reference to §204. 79 Cong. Rec. 10058-10059 (1935).

Senator Minton gave this explanation of the bill on the Senate floor, 79 Cong. Rec. 10059:

"Mr. MINTON. Mr. President, in 1926 Congress enacted what is known as the 'Railway Labor Act.' The bill now before us merely provides for the extension of the Railway Labor Act provisions to air pilots and mechanics engaged in the air service in interstate commerce."

The House Committee on Interstate and Foreign Commerce reported the bill, as amended, and said, H.R. Rep. No. 2243, 79th Cong., 2d Sess. 3 (1936):

"This measure provides for a peaceful means of settlement of all disputes common to employers and employees that may result in disturbing the movement of the air mail. In short, this measure provides the same machinery for mediating disputes in the air transportation industry which is now so successfully in effect on the railroads."

Representative Crosser said this about the bill on the House floor, 80 Cong. Rec. 5039 (1936):

"I believe all must concede that the operation of the Railway Labor Act has preserved peace in the

railway industry more effectively than has ever before been possible. For that reason we believe that it is very desirable to bring the Air Pilots Association under the operation of the Railway Labor Act. That is all that this bill does; nothing more. It does not change the terms of the Railway Labor Act. It simply brings the air pilots' organization within the terms of the Railway Labor Act."